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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] No. 237

ARCHIE NATHANIEL BIGGERS,

Petitioner,

—v.—

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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STATE OF TENNESSEE,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above entitled cause January 12, 1967, rehearing of which was denied March 1, 1967.

Citation to Opinion Below

The opinion of the Supreme Court of Tennessee is unreported and is printed in the appendix hereto, *infra*, p. 1a. The opinion of the Supreme Court denying rehearing is unreported and appears in the appendix hereto, *infra*, p. 6a.

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered on January 12, 1967, *infra*, p. 1a. Rehearing was denied March 1, 1967, *infra*, p. 6a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3),

petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Question Presented

The petitioner, a 16 year-old Negro boy, was compelled by the police, while alone in their custody at the police station, to speak the words spoken by a rapist during the offense almost eight months earlier for voice identification by the prosecutrix.

Was the denial of petitioner's right to personal dignity and integrity by the police, and the failure to give him benefit of counsel, provide him with a line-up, or with any other means to assure an objective, impartial identification of his voice by the prosecutrix a violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights.

Constitutional Provisions Involved

This petition involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Statement

Early on the morning of August 17, 1965, Archie Nathaniel Biggers, a Negro boy of 16 years, was arrested by the police and allegedly identified by a woman as the man who had attempted to rape her earlier that night (Tr. 70). The story appeared on the first page of the only morning newspaper in Nashville, The Nashville Tennessean, describing the defendant as "a burly 16 year-old Negro youth." Petitioner has never been tried on this charge.

Later the same day the police went to the home of Mrs. Margaret Beamer, the Negro prosecutrix, and requested her to accompany them to the police station to "look at a suspect." (Tr. 27-28, 57, 106, 109-110). Mrs. Beamer had been raped on the night of January 22, 1965, almost eight months earlier (Tr. 4-7, 20, 85-88). An intruder had entered her home and grabbed her in an unlit hallway (Tr. 10). Hearing her mother's screams, Mrs. Beamer's daughter ran into the hallway. She approached within a foot of the rapist, whose face was turned toward her, before being ordered by her mother to go back to her bedroom (Tr. 129-132). The intruder then took Mrs. Beamer to a patch of woods where he raped her (Tr. 4-7). Neither Mrs. Beamer (Tr. 13) nor her daughter (Tr. 141) could describe or identify the rapist. Although she once identified a police photograph of a man as "having features" like the rapist (Tr. 14a), Mrs. Beamer's case lay dormant for almost eight months for lack of clues.

When Mrs. Beamer saw Archie Biggers for the first time he was being held at the police station in the custody of five police officers (Tr. 112). Neither his parents nor relatives were present, nor had they been notified of the identification (Tr. 103-104, 111, 155). He had no lawyer. The police brought petitioner in Mrs. Beamer's presence and required him to repeat the words spoken by the rapist at the time of the offense: "Shut up, or I'll kill you" (Tr. 6, 7, 17, 47, 93, 108, 112-113, 156). From the sound of these few words—the record does not reveal that the petitioner said anything else (Tr. 17, 112-113)—spoken eight months earlier during events which lasted from 15 to 30 minutes at most from the time that the prosecutrix left her house until she returned (Tr. 30, 140-141), Mrs. Beamer identified Archie Biggers as the man who had raped her (Tr. 19). It was the same voice she was later

to describe at the trial as that of an "immature youth" who "talked soft" in a "medium-pitched" voice (Tr. 17).

The identification of the petitioner by his voice, general size, and skin and hair texture was the only evidence of petitioner's guilt[1] (Tr. 17-19). Petitioner testified in his behalf and emphatically denied committing the act charged (Tr. 152, 154, 156). His stepfather, mother and seven neighbors took the stand in his support as character witnesses and testified to his excellent reputation for truth, veracity, and good character (Tr. 185-186, 204-205, 210-212, 217-218, 224-226, 233-234, 242-245, 255-257).

On the basis of Mrs. Beamer's identification evidence the jury found Archie Biggers guilty of rape. He was sentenced to the State Vocational Training School for Boys for twenty years (Tr. 292).

How the Federal Questions Were Raised and Decided Below

The question of whether it was a violation of petitioner's Fourteenth Amendment rights to compel him to speak the words spoken by the rapist during the offense for voice identification, without benefit of counsel or minimal procedural protections, was raised for the first time in petitioner's assignment of error and brief on appeal to the Supreme Court of Tennessee filed November 7, 1966 (Ass. of Error and Br. 7, 14). Petitioner requested the Supreme Court of Tennessee to waive its Rule 14(5),[2]

[1] In Tennessee it is not mandatory that testimony of a violated female be corroborated. Tennessee Code Annotated, §39-3701 (1955); *Carroll* v. *State*, 212 Tenn. 464, 370 S.W.2d 523; *King* v. *State*, 210 Tenn. 150, 357 S.W.2d 42.

[2] Rule 14(5) provides:

Motions for new trial and in arrest of judgment essential, when.— Error in the admission or exclusion of testimony, in charging a jury,

and consider the question, although the error assigned had not been made a basis for a motion for new trial.

The pertinent assignment of error was the following:

> 5. The conviction of the defendant solely on the basis of an identification by prosecutrix predicated on his being required to make statements reenacting the circumstances of the offense while in custody without benefit of counsel or warning of his right to have an attorney with him and to remain silent, is unconstitutional and void as violating rights of defendant secured by the Fifth and Fourteenth Amendments to the Constitution of the United States in that said speech by defendant was, in effect, testimony against himself involuntarily given by a juvenile under circumstances so fundamentally unfair and oppressive as to invalidate all evidence flowing therefrom under said constitutional circumstances (Ass. of Error and Br. 7-8, 14-16).

The Supreme Court of Tennessee waived Rule 14(5) and decided the federal question raised by petitioner's assignment of error 5, renumbered 4 by the court, *infra*,

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or refusing further instructions, misconduct of jurors, parties or counsel, or other action occurring or committed on the trial of the case, civil or criminal, or other grounds upon which a new trial is sought, will not constitute a ground for reversal, and a new trial, unless it affirmatively appears that the same was specifically stated in the motion made for a new trial in the lower court, and decided adversely to the plaintiff in error, but will be treated as waived, in all cases in which motions for a new trial are permitted; nor will any supposed matter in arrest of judgment be considered unless it appears that the same was specifically stated in a motion, seasonably made in the trial court, for that purpose, and held insufficient. This is a court of appeals and errors, and its jurisdiction can only be exercised upon questions and issues tried and adjudged by inferior courts, the burden being upon the appellant, or plaintiff in error, to show the adjudication, and the error therein, of which he complains.

pp. 4a, 5a. The court held that the voice identification test had not violated petitioner's constitutional rights against self-incrimination because "the only thing he gave was the sound of his voice to be used, along with other things, solely for the purpose of identification" *infra,* p. 5a.

In his petition for rehearing to the Supreme Court of Tennessee, petitioner renewed the allegations made in his fifth assignment of error. The Supreme Court of Tennessee denied the petition, *infra,* p. 6a, on March 1, 1967.

REASONS FOR GRANTING THE WRIT

I.

Petitioner Was Denied His Rights Under the Due Process Clause of the Fourteenth Amendment and the Fifth and Sixth Amendments to the United States Constitution Under Circumstances Similar to Those in Conflicting Court of Appeals Cases Granted Certiorari and Presently Pending Before This Court.

The facts in this case are starkly simple, but they raise a critical question of the fairness and impartiality of police identification practices. They reveal that Archie Biggers was denied his right to a fair trial by police practices which denied him elementary Fourteenth Amendment protections.

The only evidence against petitioner at trial was the identification made by the prosecutrix, Mrs. Margaret Beamer, that Archie Biggers was the man who had raped her. Biggers, a 16 year old Negro was arrested early on the morning of August 17, 1965 and charged with the attempted rape of another woman (Tr. 70). Later the same day, the police brought Mrs. Beamer, who had been

raped on the night of January 22, 1965, almost eight months earlier (Tr. 4-7, 20, 85-88) to "look at a suspect" (Tr. 27-28, 57, 106, 109-110). Unable to describe or identify her assailant (Tr. 13) her case had remained without clues. Asked to identify Biggers if she could, the first view she had of the petitioner was of him alone in the custody and presence of five police officers (Tr. 112). He had no lawyer. The police then required him to speak the exact words of the rapist spoken during the offense (Tr. 6, 7, 17, 47, 93, 108, 112-113, 156), on the basis of which she identified petitioner as the rapist. These were the circumstances surrounding the identification by the prosecutrix.

The facts in this case raise the issue present in conflicting Second and Fifth Circuit cases which this Court has granted certiorari to determine. *United States ex rel. Stovall* v. *Denno,* 355 F.2d 731 (2nd Cir. 1966), cert. granted 34 U.S.L. Week 3429 (June 20, 1966); *Wade* v. *United States,* 358 F.2d 557 (5th Cir. 1966), cert. granted 35 U.S.L. Week 3124 (Oct. 10, 1966). The Second Circuit, sitting *en banc,* held that the defendant's Fifth, Sixth and Fourteenth Amendment rights were not violated when he was taken to the victim's hospital room for identification without the benefit of a line-up or counsel, even though arraignment had been postponed to allow him to obtain counsel. The Fifth Circuit, in *Wade* v. *United States, supra,* specifically adopted the view of the dissenting judges in *United States ex rel. Stovall* v. *Denno, supra.* It excluded testimony of the line-up on the ground that the line-up had violated the defendant's constitutional rights because two witnesses had seen him in the custody of the police shortly before the line-up, and defendant's counsel had not been notified and was not present at the line-up. Archie Biggers, like Wade, was denied elemental protections against suggestion and the right to counsel during

the test to identify his voice. Indeed, the circumstances of Biggers' identification were less conducive to impartiality than those in *United States* v. *Wade, supra,* and the arguable necessity for speed in identification and difficulty in arranging a line-up involved in *United States ex rel. Denno, supra,* is not present in this case.

As the question presented in this case raises issues similar to issues already pending before this Court, certiorari is appropriate here. Compare *Shelley* v. *Kraemer,* 334 U.S. 1 (1948) with *Trustees of Monroe Avenue Church of Christ* v. *Perkins,* 334 U.S. 813 (1948).

II.

The Facts in This Case Show That Petitioner Was Denied Due Process of Law and the Protection of the Fifth and Sixth Amendments to the Constitution of the United States.

The voice identification of Archie Biggers was made in a manner which could scarcely have been less conducive to an impartial judgment. The sudden arrival of the police to take her to "look at a suspect" (Tr. 27-28, 57, 106, 109-110) the first view of the petitioner in custody of five policemen (Tr. 112) and the repetition of the rapist's words (Tr. 6, 7, 17, 47, 93, 108, 112-113, 156) merged to create an atmosphere charged with suggestion that this man was the rapist. Time, almost eight months, inevitably dulls recollection, and increases the temptation to succumb to suggestion.

The danger which is obvious and inherent in any identification process involving sensory perception by a witness is that extraneous factors may intervene to color and prejudice what should be an objective decision. That sen-

sory perception, at very best, is not completely reliable is clear from the documentation of supposedly "irrefutable" identifications later proved incorrect. See Borchard, *Convicting the Innocent,* p. xii (1932); Frank, *Not Guilty,* p. 31 (1957).

To negate inference or suggestion from an identification proceeding, a line-up is generally regarded as essential to provide a mode of comparison by police authorities. See *Criminal Investigation and Interrogation,* Gerber and Schroeder ed., §22.20 (1962); *Criminal Investigation,* Jackson ed. (5th ed. 1962) at pp. 41-42. The failure to provide Archie Biggers with the protection of a line-up in a rape case, considering his youth, the eight month period since the rape and other circumstances is inexcusable. There was no reason for the lack of a line-up, and every reason to provide one. As Archie Biggers was being held in police custody for an unrelated charge, this is not a case of street identification immediately after arrest, nor even a case where it was physically impossible to hold a line-up. Nor was there need to identify Archie Biggers quickly. Mrs. Beamer had been raped eight months earlier and the time necessary to arrange a line-up certainly would not have affected her identification. Indeed, the time lapse, well known to the police, should have been sufficient to mandate a line-up to police conscientiously seeking an impartial, dispassionate identification.

Presented before Mrs. Beamer without a line-up, and in the custody of five officers, Archie Biggers was required to speak the words spoken by the rapist. He said nothing else. Although this proceeding was supposedly held to test the tone and timbre of petitioner's voice, and upheld by the Supreme Court of Tennessee on this basis, *infra,* p. 5a, it would have been an extraordinary feat if the prosecutrix could have ignored the particular words spoken

and concentrated solely on the sound of the voice making them. Moreover, there was no reason to require the petitioner to speak the rapist's words. Mrs. Beamer had not indicated that the rapist spoke any word or combination of words in a distinctive or unusual manner which would aid identification. This fact was emphasized at trial when she could only describe the voice as "medium-pitched," "immature" and "soft" (Tr. 17). The use of the rapist's words were an unwarranted suggestion that the speaker was the rapist.

Identification, by whatever method, is similar to and has much the same legal effect as self-incrimination. When, as here, identification procedures cease to be objective because the person being identified is required to do something which improperly suggests that he and the offender are the same person, the due process standard of fairness, including the right against self-incrimination, is violated. The suggestion inherent in the use of the rapist's words is alone, and in combination with the total circumstances of the case, a violation of due process.

The test of Biggers' voice violated his Fifth Amendment rights because he was compelled by the police to exercise his will to speak. Requiring petitioner to make the positive act of speaking and forming particular words violated "the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev. 1961), 317, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own

mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966). This is a restatement of this Court's long-held view that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Justice Frankfurter in *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949), quoting from 2 Hawkins, Pleas of the Crown (46, §34) (8th ed. 1824).

This question is one of first instance before this Court. In *Holt* v. *United States*, 218 U.S. 245 (1910), the leading case in this Court, Justice Holmes rejected the argument that the Fifth Amendment was violated when the accused was requested to model a blouse for identification. In that case no exercise of the suspect's will was required since the blouse merely rested on his body, and might just as well been held up against his body. Justice Holmes appears to have recognized the Fifth Amendment's protection against the government overbearing an individual's will when he said, "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition against the use of *physical or moral compulsion* to extort communications from him, not an exclusion of his body as evidence when it may be material." (218 U.S. at pp. 252-253) (emphasis supplied). It is obvious that a person cannot be compelled to speak against his will without "physical or moral compulsion."

More recently, this Court held in *Schmerber* v. *California*, 384 U.S. 757 (1966) that a compulsory blood test did not violate the Fifth Amendment. The court expressly refused to adopt Professor Wigmore's view that voice identification does not violate the Fifth Amendment (footnote 7, 384 U.S. at 763), and all past applications of the distinction that the Fifth Amendment bars "testimony" but not compulsion making the suspect a source of "real or physical evidence" (384 U.S. at 764). The Wigmore view that the Fifth Amendment bars only testimonial dis-

closures, 8 Wigmore, Evidence, §2263 (McNaughton rev. 1961), has been strongly challenged. Judge Wisdom, in *DeLuna* v. *United States*, 308 F.2d 140, 145 (5th Cir. 1962), said, "Professor Wigmore was consistently unfriendly to the [Fifth Amendment] privilege, especially to its recognition when there was no direct coercion by the government and when there was no formal charge to which the unanswered questions relate; his writings are an inexhaustible quarry of quotations for use against the policy of the privilege."

The true scope of the Fifth Amendment protects against governmental overbearing of a person's will. An individual has the right to be protected from coercion designed to make him do something controlled only by his will, which is the heart of a person's being and the source of his individuality. To invade this sanctuary is to destroy the well-spring of his integrity and dignity as a human being. These are values that the Fifth Amendment seeks to shield from governmental intrusion by "physical or moral compulsion."

Archie Biggers was also denied his right to assistance of counsel at the time of his identification, clearly a "critical stage" in his case. *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964). The police were without a clue to the identity of the man who had raped Mrs. Beamer. If she could identify a man it would certainly form at least the basis for prosecution. If counsel had been present he could have done several things to insure an impartial test. He could have requested a line-up, or alternatively some other plan to assure conditions designed to avoid suggestion. If present, counsel could have questioned the prosecutrix during identification before she had placed herself in the position of making a positive identification. It is quite possible that his mere presence would have served to counterbalance that of the

police, and the inherent suggestiveness of police station identification of one in custody. Had counsel been present he might have prevented the police from requiring the petitioner to speak the words of the rapist, words which carried an inherent suggestion of guilt. Or counsel might have advised his client to remain silent.

The circumstances of this case, taken separately and in combination, establish violations of the due process clause of the Fourteenth Amendment, and through it, violations of the Fifth and Sixth Amendments. An instructive decision is *Palmer* v. *Peyton*, 359 F.2d 199 (4th Cir. 1966), where the Fourth Circuit, sitting *en banc*, held without dissent that a voice identification test without a line-up, in addition to police failure to eliminate suggestions of guilt before the test, violated due process. We believe the principle set forth by Judge Sobeloff in that case is equally applicable here:

> "In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether Palmer's voice was in fact that of the man who had attacked her. Such procedure fails to meet 'those canons of decency and fairness' established as part of the fundamental law of the land" (359 F.2d at p. 202).

CONCLUSION

WHEREFORE, petitioner prays that the petition for writ of certiorari be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX